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THE SUPREME COURT AND THE FIRST AMENDMENT: THE 1993-94 TERM

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During its 1993-94 term, and for the fourth time in the last five years, the Supreme Court experienced a change in judicial personnel with the retirement of Justice Harry Blackmun[1] and the nomination and confirmation of Justice Stephen Breyer.[2] As the confirmation process proceeded, perhaps the most frequent characterization of Justice Breyer was that he is a "pragmatist" and a "moderate."[3] Not an ideologue who would seek to push the Court far in any direction, Justice Breyer was described as a practical judge who would help the Court avoid extremes, and who would also follow a moderate course in many areas.[4]

Without disputing the popular characterization of Justice Breyer, however, it became clear in the 1993-94 term that at least with respect to the First Amendment, the pre-Breyer Supreme Court was already quite capable of avoiding extremes and pursuing moderation.[5] In three significant cases in which the Court was

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[1] *See* Richard S. Arnold, *Justice Harry Blackmun: Some Personal Notes*, 43 AM. U. L. REV. 699, 699 (1994).

[2] *See* Linda Greenhouse, *Plaudits Drown Out Critics as Senate Confirms Breyer*, N.Y. TIMES, July 30, 1994, at A6.

[3] *See, e.g.*, David Margolick, *Scholarly Consensus Builder*, N.Y. TIMES, May 14, 1994, at A1; Gwen Ijill, *Pragmatic Jurist*, N.Y. TIMES, May 14, 1994, at A1; Joan Biskupic, *A Moderate Pragmatist: Nominee Widely Admired in Legal Circles*, WASH. POST, May 14, 1994, at A1.

[4] *See* Ijill, *supra* note 3, at A1.

[5] *See* David M. O'Brien, *Split Decisions . . . The Right Wing of the U.S. Supreme Court Has Been Nearly Vanquished by the Centrist Majority*, COLUMBIAN, Oct. 30, 1994, at 6 (describing how control of the Supreme Court by centrists has resulted in fewer cases being heard in an effort to cease the overturning of liberal precedents by arch-conservatives).

divided on First Amendment questions, the majority chose a "moderate" course in between more extreme positions advocated by dissenters. For example, in *Turner Broadcasting System, Inc. v. FCC*,[6] which concerned federal legislation requiring that cable television companies "must carry" certain local broadcast television signals, the majority rejected both the view that the legislation should be subjected to strict First Amendment scrutiny, and Justice Stevens' suggestion that the law should be upheld.[7] Instead, the Court remanded the case for a more detailed review based on the "intermediate scrutiny" standard.[8] Similarly, in *Madsen v. Women's Health Center, Inc.*,[9] which concerned the validity of injunctive relief against protesters outside an abortion clinic, the majority again rejected strict scrutiny, but demanded more than intermediate scrutiny, and approved part of the injunction while striking down the remainder of it.[10] And, in *Waters v. Churchill*,[11] the Court effectively adopted another intermediate standard with respect to First Amendment protection for government employees.[12]

Moderation was evident in other Supreme Court First Amendment decisions as well. In two rulings, one concerning government regulation of signs on private property,[13] and another interpreting the Federal Racketeer Influenced and Corrupt Organizations law,[14] the Court was unanimous in result and, for the most part, in rationale.[15] And in the Court's only Establishment Clause decision this term, *Board of Education of Village of Kiryas Joel v. Grumet*,[16] the majority again rejected attempts to substantially weaken church-state separation, but also clearly stated that

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[6] 114 S. Ct. 2445 (1994); *see* discussion *infra* part II.E.

[7] *Turner*, 114 S. Ct. at 2473.

[8] *Id.* at 2469, 2472.

[9] 114 S. Ct. 2516 (1994); *see* discussion *infra* part II.A.

[10] *Madsen*, 114 S. Ct. at 2521, 2524.

[11] 114 S. Ct. 1878 (1994); *see* discussion *infra* part II.B.

[12] *Waters*, 114 S. Ct. at 1884.

[13] *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2040 (1994) (discussing LADUE, MO., ORDINANCES § 35-1-10 (1991)).

[14] 18 U.S.C. §§ 1961-68 (1988); *see* NOW v. Scheidler, 114 S. Ct. 798, 803 (1994).

[15] *Gilleo*, 114 S. Ct. at 2038; *Scheidler*, 114 S. Ct. at 798. For a discussion of *Gilleo*, see *infra* part II.C. For a discussion of *Scheidler*, see *infra* part II.A.

[16] 114 S. Ct. 2481 (1994); *see* discussion *infra* part I.

accommodation of religion is appropriate under some circumstances.[17] The Court also reached a pragmatic result in this case by striking down a statute seeking to accommodate the religious and educational concerns of a Satmar Hasidim village.[18] The Court held that the statute violated key constitutional principles, which demand religious neutrality by government.[19]

The Court's voting patterns in the seven First Amendment cases decided in the 1993-94 term also offer interesting results. One Justice voted with the majority in all seven cases—Justice Souter—who wrote the majority opinion in *Kiryas Joel*,[20] and important concurring opinions in *NOW v. Scheidler*[21] and *Waters*.[22] At the other extreme, Justices Scalia and Thomas voted against the majority in three of the seven cases,[23] and voted identically with each other in all seven.[24]

This Article will review each of the Court's First Amendment-related decisions during the 1993-94 term. These include the Establishment Clause ruling in *Kiryas Joel* and six decisions relating to free speech issues.

I. The Establishment Clause: Board of Education of Kiryas Joel Village School District v. Grumet

In *Board of Education of Kiryas Joel Village School District v. Grumet*,[25] the Supreme Court held, six to three, that a New York statute, which created a school district coterminous with the boundary lines of a village that is a religious enclave of Satmar Hasidic Jewish

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[17] *Kiryas Joel*, 114 S. Ct. at 2494.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 2481.

[21] 114 S. Ct. at 806.

[22] 114 S. Ct. at 1891.

[23] *See Kiryas Joel*, 114 S. Ct. at 2481; *Madsen*, 114 S. Ct. at 2516; *Turner*, 114 S. Ct. at 2445.

[24] *See Scheidler*, 114 S. Ct. at 800; *Gilleo*, 114 S. Ct. at 2040; *Ibanez*, 114 S. Ct. at 2086; *Waters*, 114 S. Ct. at 1893; *Kiryas Joel*, 114 S. Ct. at 2481; *Madsen*, 114 S. Ct. at 2516; *Turner*, 114 S. Ct. at 2445.

[25] 114 S. Ct. 2481 (1994).

sect,[26] violated the Establishment Clause of the First Amendment.[27] Under what may be unique factual circumstances, the Court determined that this statute impermissibly advanced religion.[28] The Court's decision again disappointed those, like Justice Scalia,[29] who have sought fundamental change in the Court's Establishment Clause jurisprudence.[30] But the decision offers significant insights into the Justices' thinking in the area of the Establishment Clause.[31]

Kiryas Joel is a community located in Orange County, New York, which is occupied exclusively by the Satmar Hasidim, practitioners of a specific, strict form of Judaism.[32] In 1977, under state law, the incorporators of Kiryas Joel drew their village boundaries in order to exclude all but the Satmar Hasidim from this community.[33] The village fell within the Monroe-Woodbury Central School District until 1989, when the New York Legislature passed Chapter 748,[34] which carved out a separate district following Kiryas Joel village lines.[35]

The residents of Kiryas Joel go to great lengths to maintain their separate religious and social identity. Children of the village are

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[26] *Id.* at 2484-85.

[27] *Id.* at 2484.

[28] *See id.* at 2494.

[29] *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring). Referring to the Establishment Clause test of Lemon v. Kurtzman, 403 U.S. 602 (1971), Justice Scalia stated: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence again." *Lamb's Chapel*, 113 S. Ct. at 2149.

[30] *See, e.g.*, *All Things Considered: Court Rules Kiryas Joel School Unconstitutional*, (National Public Radio radio broadcast, June 27, 1994), *available in* LEXIS, News Library, CURNWS File ("[T]oday's court ruling was a bitter dissapointment for conservative religious groups and judicial philosophers, who, beginning in the mid-1980's, had seen signs that the increasingly conservative Supreme Court was preparing to abandon decades of liberal decisions.").

[31] This is largely due to the fact that six separate opinions were filed by the Court. *Kiryas Joel*, 114 S. Ct. at 2484.

[32] *Id.* at 2483.

[33] *Id.*

[34] 1989 N.Y. Laws, ch. 748.

[35] *Kiryas Joel*, 114 S. Ct. at 2483.

educated in private religious schools.[36] Boys receive a thorough grounding in the Torah, and limited exposure to secular subjects, while girls are educated in a separate school designed to prepare them for their roles as wives and mothers.[37] The religious schools in Kiryas Joel do not, however, provide any specific services to disabled children, who are entitled, under federal and state law, to special education services even if enrolled in private schools.[38]

In 1984, the Monroe-Woodbury Central School District started providing special education services to the children of Kiryas Joel in the annex of a religious school.[39] In light of Supreme Court decisions limiting the provision of such services to religious school students on religious school grounds,[40] this service was terminated.[41] As a result, children from Kiryas Joel who needed special education were required to attend public schools outside the village.[42] The parents of several students sought review of the public school placements of their children, while other parents withdrew their children from Monroe-Woodbury secular schools, citing "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different from theirs."[43]

By 1989, only one disabled child from Kiryas Joel was attending Monroe-Woodbury's public schools; the village's other handicapped children received privately funded special education services or went without such services altogether.[44] In 1989, the New York Legislature passed Chapter 748, providing that the Village

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[36] *Id.* at 2485.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See* Aguilar v. Felton, 473 U.S. 402, 409 (1985) (holding that a New York City program, which used federal funds to pay salaries of public school employees who taught in parochial schools, violated the Establishment Clause); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (holding that school district programs, which provided classes to nonpublic school students at public expense in classrooms located in and leased from nonpublic schools, violated the Establishment Clause).

[41] *Kiryas Joel*, 114 S. Ct. at 2485.

[42] *Id.*

[43] *Id.* at 2481, 2485.

[44] *Id.* at 2486.

of Kiryas Joel "constituted a separate school district . . . and shall have and enjoy all the powers and duties of a union free school district."[45] Although the Kiryas Joel School District had plenary legal authority over elementary and secondary education of all school-aged children in the village,[46] the district chose to open only a special education program for handicapped children as a public school.[47] Other students in the village were to continue to receive private religious education.[48]

Several months before the new district began operation, the New York School Board Association and two of its officials challenged the law as an unconstitutional establishment of religion.[49] The Kiryas Joel Village School District and the Monroe-Woodbury Central School District intervened as defendants.[50]

On cross-motions for summary judgment, the trial court ruled that the statute violated the Establishment Clause of the First Amendment.[51] A divided appellate division affirmed, on the grounds that Chapter 748 had the primary effect of advancing religion, in violation of both the federal and state constitutions.[52] The New York Court of Appeals affirmed on the federal question, determining that, because both the district's public school population and its school board would be exclusively Hasidic, the statute created a "symbolic union of church and state" that was "likely to be perceived by the Satmar Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval" of their own.[53] The Supreme Court stayed the mandate of the court of appeals,[54] and granted certiorari to address the sole issue of whether creating the separate school district

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[45] 1989 N.Y. Laws, ch. 748 § 1.

[46] N.Y. EDUC. LAW § 3202 (McKinney 1981 & Supp. 1994).

[47] *Kiryas Joel*, 114 S. Ct. at 2486.

[48] *Id.*

[49] Grumet v. Board of Educ., 592 N.Y.S.2d 123, 125-26 (App. Div. 3d Dep't 1992). The state appellate court ruled that the Association and its officers lacked standing to challenge the constitutionality of Chapter 748, but the officials proceeded with the challenge in their capacities as citizen-taxpayers. *Id.* at 126.

[50] *Id.*

[51] Grumet v. N.Y. State Educ. Dep't, 579 N.Y.S.2d 1004, 1007-08 (Sup. Ct. 1992).

[52] *Grumet*, 592 N.Y.S.2d at 126.

[53] Grumet v. Board of Educ., 618 N.E.2d 94, 100 (N.Y. 1993).

[54] Board of Educ. v. Grumet, 114 S. Ct. 2481, 2487 (1994).

violated the Establishment Clause of the First Amendment.[55]

Relying in large measure on *Larkin v. Grendel's Den, Inc.*,[56] Justice Souter, writing for the Court majority, determined that Chapter 748 violated the Establishment Clause.[57] In *Larkin*, the Court struck down a Massachusetts statute granting religious bodies veto power over applications for liquor licenses.[58] The Court determined in *Larkin* that a state may not delegate its civic authority to a group chosen according to a religious criterion.[59] Justice Souter explained in *Kiryas Joel* that the authority over public schools "'ranks at the very apex of the function of a State.'"[60] In accordance with *Larkin*, the Court plurality concluded that this authority could not be delegated by the State to a local school district, defined by the State, in order to grant political control to a religious group, such as the Satmar Hasidim.[61]

Although the beneficiaries of government authority were religious leaders and officers in *Larkin*, while in *Kiryas Joel* the beneficiaries were a group of religious individuals united by a common doctrine, the plurality found this factor unimportant in its analysis.[62] Justice Souter wrote:

> Although some school district franchise is common to all voters, the State's manipulation of the franchise for this district limited it to Satmars, giving the sect exclusive control of the political subdivision. In the circumstances of this case, the difference between thus vesting state power in the members of a religious

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[55] *Id.*

[56] 459 U.S. 116 (1982).

[57] *Kiryas Joel*, 114 S. Ct. at 2488. Most of Justice Souter's opinion was joined by Justices Blackmun, Stevens, O'Connor, and Ginsburg. *Id.* Justice O'Connor did not join the portion of the opinion which focused on improper delegation of governmental authority, meaning that a plurality of four Justices agreed with that rationale. *Id.* Justice Kennedy concurred in the result, but not the rationale of the Court. *Id.* at 2500.

[58] *Larkin*, 459 U.S. at 127.

[59] *Id.* at 123.

[60] *Kiryas Joel*, 114 S. Ct. at 2494 (quoting Wis. v. Yoder, 406 U.S. 205, 213 (1972)).

[61] *Id.* at 2481.

[62] *Id.* at 2488.

> group as such instead of the officers of its sectarian organization is one of form, not substance.[63]

The plurality looked beyond the mere words of Chapter 748, and examined the context in which the legislature passed the law.[64]

In this regard, the plurality determined that when the New York Legislature enacted Chapter 748, the lawmakers were well aware of the fact that the incorporators of Kiryas Joel drew the village's boundary lines so that the village would be comprised solely of Satmar Hasidim.[65] The plurality also found it troubling that the carving out of the Kiryas Joel School District ran counter to customary districting practices in the state—following the lines of the Satmar Hasidim religious community where "customary and neutral principles would not have dictated the same result."[66] For these reasons, the plurality agreed that the delegation of governmental authority to a school district effectively defined by its religious doctrinal adherence was a "'purposeful and forbidden fusion of governmental and religious functions'" in violation of the Establishment Clause.[67]

The Court also found that Chapter 748 was defective because the benefit conferred by the law applied only to a single sect, the Satmar Hasidim.[68] "A proper respect for both the Free Exercise Clauses compels the State to pursue a course of 'neutrality' toward religion, . . . favoring neither one religion over others nor religious

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[63] *Id.* The Court plurality distinguished McDaniel v. Paty, 435 U.S. 618 (1978), which held that religious people, or groups of religious people, cannot, because of their religious activities, be denied the right to hold political office. *Id.* The Court determined that this principle was not relevant in *Kiryas Joel* because it does not mean that a state "may deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity." *Id.* at 2489. Although Chapter 748 did not expressly extend authority by reference to the religious belief of the Satmar community, the Court nonetheless concluded that Chapter 748 effectively identified the recipients of the governmental authority by reference to their doctrinal adherence. *Id.*

[64] *Id.* at 2484-86.

[65] *Kiryas Joel*, 114 S. Ct. at 2485.

[66] *Id.* at 2490.

[67] *Id.* (quoting *Larkin*, 459 U.S. at 126 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963))).

[68] *Id.* at 2491.

adherents collectively over nonadherents."[69] Justice Souter expressed concern that the New York Legislature would fail to exercise its governmental authority in a neutral manner, focusing on the case-specific manner in which the New York Legislature created the Kiryas Joel Village School District.[70] Because the Kiryas Joel Village School District did not receive its authority simply as one of many communities eligible for equal treatment under a general law, the Court had no "assurance that the next similarly situated group seeking a school district of its own will receive one."[71] Justice Souter wrote that the Court had no direct way to review such state action for the purpose of "safeguarding a principle at the heart of the Establishment Clause."[72]

The plurality rejected the argument that Chapter 748 was an appropriate accommodation of religion, explaining that the law clearly crossed the line separating permissible accommodation from impermissible establishment.[73] Although the Court acknowledged that the Constitution allows a state to accommodate religious needs by alleviating special burdens, it also recognized that "accommodation is not a principle without limits."[74] Although prior Court decisions had endorsed governmental accommodation in various forms,[75] Justice Souter explained that these decisions do not indicate that an "unconstitutional delegation of political power to a religious group could be saved as a religious accommodation."[76]

The plurality explained that its decision did not foreclose

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[69] *Id.* at 2487 (citing Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 793-94 (1973)).

[70] *Kiryas Joel*, 114 S. Ct. at 2491.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 2492.

[74] *Id.*

[75] *See, e.g.*, Corporation of Presiding Bishop of Church of Jesus Christ of Later-Day Saints v. Amos, 483 U.S. 327, 334-40 (1987) (holding that the government may allow religious organizations to favor their own adherents in hiring, even for secular employment); Zorach v. Clauson, 343 U.S. 306, 308-15 (1952) (holding that government may allow public schools to release students during the school day to receive off-site religious education).

[76] *Kiryas Joel*, 114 S. Ct. at 2493.

other ways to respond to the needs of disabled Kiryas Joel students.[77] Justice Souter suggested that services could have been provided at a neutral site in the nearby Monroe-Woodbury School.[78] According to a concurring opinion by Justice Stevens, with whom Justices Blackmun and Ginsburg joined, the State could have taken steps to alleviate the children's fears by teaching their schoolmates to be "tolerant and respectful of Satmar customs."[79] Such steps would not have raised "constitutional concerns and would further the strong public interest in promoting diversity and understanding in the public schools."[80] Justice Stevens concluded that the State instead chose to enact Chapter 748, which "supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors."[81]

Justice Kennedy concurred in the result reached by the Court, explaining that although he believed that a legislature *can* permissibly accommodate the "unique problems of a particular religious group," the legislation was impermissible in this case because political boundaries were drawn "on the basis of religion."[82] Justice O'Connor, concurring in part and concurring in the judgment, took a different approach to the issue of accommodation.[83] Based on the history and the surrounding statutory scheme of Chapter 748, Justice O'Connor saw the law as an impermissible grant of religious favoritism, as opposed to a general accommodation through neutrally applicable legislation.[84] Both Justice O'Connor and Justice Kennedy criticized previous Court decisions, such as *Aguilar v. Felton*,[85] which held that government sponsored special education services could not be provided on-site at parochial schools, yet could be provided at

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[77] *Id.*

[78] *Id.*

[79] *Id.* at 2495 (Stevens, J., concurring).

[80] *Id.*

[81] *Kiryas Joel*, 114 S. Ct. at 2495 (Stevens, J., concurring).

[82] *Id.* at 2501 (Kennedy, J., concurring). Justice Kennedy explained that, although the legislature had not explicitly stated that it was acting based on religion, it clearly "knew" that everyone within the village was Satmar and "in effect [employed] a religious test." *Id.* at 2504.

[83] *Id.* at 2497 (O'Connor, J., concurring).

[84] *Id.* at 2498.

[85] 473 U.S. 402 (1985).

public and non-parochial schools.[86] Justice O'Connor characterized this as impermissibly promoting "animosity," rather than "impartiality," towards religion.[87] Coupled with the more extreme views of the three dissenters in *Kiryas Joel*, the opinions of Justices Kennedy and O'Connor strongly suggest that a majority of the Court is prepared to reconsider and overrule *Aguilar* and related decisions.[88]

Justice O'Connor also criticized *Lemon v. Kurtzman*,[89] another of the Court's Establishment Clause precedents.[90] Although not calling for the explicit overruling of *Lemon*, O'Connor suggested that the "unitary test" for Establishment Clause violations in *Lemon* is not sufficiently sensitive to different fact patterns and categories of cases.[91] Even if accepted by a majority of the Court, Justice O'Connor's view does not necessarily signal a revolution in constitutional jurisprudence, because, as she observed, the Court has increasingly decided Establishment Clause cases without specific reference to the *Lemon* test.[92] Justice O'Connor also stated that even abandoning the test itself "need not mean abandoning some of the insights that the test reflected," such as the principle that government speech, which "endorses or disapproves of religion," violates the Establishment Clause.[93] In addition, Justice Blackmun's concurring

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[86] *Id.* at 411-12 (reasoning that the secondary schools in this case were not "pervasively sectarian," had a "substantial" effect of indoctrinating religious values and would thus require ongoing inspection to "ensure the absence of a religious message"); *see Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring); *id.* at 2505 (Kennedy, J., concurring).

[87] *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring).

[88] *See id.* at 2498 (O'Connor, J., concurring); *id.* at 2505 (Kennedy, J., concurring).

[89] 403 U.S. 602 (1971).

[90] In *Lemon*, the Court concluded that statutes which provided state aid to religious schools involved "excessive entanglement" between the government and religion, and, therefore violated, the Establishment Clause. *Id.* at 603. The Court reasoned that religion must be a private matter for an individual, family, and institutions of private choice without government involvement. *Id.* at 625.

[91] *Kiryas Joel*, 114 S. Ct. at 2499-2500 (O'Connor, J., concurring). Government action violates the Establishment Clause if it: (1) has the purpose of advancing religion; (2) has the primary effect of advancing religion or inhibiting religion; or (3) impermissibly entangles government with religion. *See Lemon*, 403 U.S at 612-13.

[92] *Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring).

[93] *Id.* at 2500.

opinion specifically noted that the plurality did not depart from *Lemon*, and appeared to implicitly, if not explicitly, rest on several of *Lemon*'s criteria.[94] At the very least, however, O'Connor's opinion explicitly suggests that while *Lemon* and its principles may continue to be applied by the Court, it will not provide the exclusive test by which Establishment Clause violations will be measured.[95]

Justice Scalia, joined by Justices Rehnquist and Thomas, vigorously dissented from the Court's determination that Chapter 748 was an impermissible establishment of religion.[96] According to Justice Scalia, *Larkin* was totally inapplicable because it prohibited governmental delegation of civil authority to a church, not citizens who share a common religion.[97] To Justice Scalia, this was a critical factor that made *Larkin* "unique and rare," and characterized Justice Souter's dismissal of this distinction as "breathtaking," and as casting doubt on the constitutionality even of the admission of the predominantly Mormon State of Utah.[98] Justice Scalia also criticized Justice Souter's willingness to believe that it was the theological distinctiveness, as opposed to the cultural distinctiveness of Kiryas Joel residents, that was the basis for New York's decision to allow the residents to operate their own school district.[99] According to Scalia, it was a "remarkable stretch" for the Court to say that the law was motivated by a desire to favor, or disfavor, a particular religious group, because it was quite logical that the geographical boundaries selected for the district were those that already existed for the village.[100] Moreover, even if the school district was created to accommodate the Satmars' religion, Scalia argued that the Court's decision is "at war" with "traditional accommodation doctrine."[101]

As Justice Souter's opinion deftly observed, the "gladiator"-like dissent of Justice Scalia "thrusts at lions of his own

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[94] *Id.* at 2494-95 (Blackmun, J., concurring).

[95] *Id.* at 2499 (O'Connor, J., concurring).

[96] *Id.* at 2505 (Scalia, J., dissenting).

[97] *Kiryas Joel*, 114 S. Ct. at 2507 (Scalia, J., dissenting).

[98] *Id.*

[99] *Id.* at 2509.

[100] *Id.* at 2508.

[101] *Id.* at 2513.

imagining."[102] Unlike the State of Utah, which was "laid out according to traditional political methodologies taking account of lines of latitude and longitude and topographical features," Souter explained, the Kiryas Joel district line was "purposely drawn to separate Satmars from non-Satmars."[103] This factor, coupled with the principle of "neutrality toward religion as well as among religious sects," clearly made the difference in regards to the Mormon-dominated State of Utah's admission to the Union.[104] Despite the vigorous dissent by Scalia in *Kiryas Joel*, as in previous cases,[105] the Court majority continued to adhere to this fundamental principle of neutrality with respect to the Establishment Clause.

II. Freedom of Speech

The remaining Supreme Court decisions on the First Amendment in the 1993-94 term focused on speech issues in a range of contexts. These included cases dealing with abortion and free speech, free speech rights of government employees, regulation of professional advertising, speech on private property, and cable television.

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[102] *Kiryas Joel*, 114 S. Ct. at 2493.

[103] *Id.* at 2494.

[104] *Id.* Following the issuance of the Court's decision, the New York State Legislature enacted a statute that re-established the Kiryas Joel School District. *See* Gary Spencer, *School District Measure Affirmed*, N.Y. L.J., Mar. 9, 1995, at 1. Justice Lawrence E. Kahn, who struck down the 1984 statute establishing the district, held that the new statute was constitutional, and is "a 'general law' that would enable any city, village or town to create its own district if it met certain 'religion-neutral' conditions." *Id.* (quoting Justice Lawrence E. Kahn).

[105] *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2683-86 (1992) (Scalia, J., dissenting).

A. Abortion and Free Speech: Madsen v. Women's Health Center *and* NOW v. Scheidler

In *Madsen v. Women's Health Center, Inc.*,[106] the Court was asked to decide the constitutionality of a state court injunction limiting certain forms of protest by anti-abortion protesters outside an abortion clinic.[107] The Court ultimately upheld some parts of the injunction, while holding other parts unconstitutional.[108] In doing so, the Court articulated a new standard for analyzing content-neutral injunctions that restrict speech.[109] Under the new standard, courts must ask "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[110]

Madsen concerned a series of Operation Rescue[111] protests which impeded access to an abortion clinic in Melbourne, Florida.[112] Based on evidence of disruption and harassment, a state court initially entered a speech-neutral injunction, which enjoined Operation Rescue from interfering with access to the clinic or physically harassing persons entering or leaving it.[113] Some six months later, the court found that, despite the initial injunction, protesters continued to impede clinic access, and to physically and otherwise harass patients, doctors, and clinic personnel.[114] The court accordingly concluded that additional injunctive relief was necessary "to protect the health, safety and rights" of clinic staff and patients.[115]

The new, broader injunction prevented the protesters from

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[106] 114 S. Ct. 2516 (1994).

[107] *Id.* at 2518.

[108] *Id.* at 2530.

[109] *Id.* at 2525.

[110] *Id.*

[111] Operation Rescue, a national pro-life organization, is well known for its protests outside of medical clinics where abortions are performed. *See* Michael Kinsley, *Why Not Kill the Baby Killers?*, TIME, Aug. 15, 1994, at 64. The organization's stated purpose is to persuade doctors and patients to adopt the view that abortion is equivalent to the murder of innocent children. *Id.*

[112] *Madsen*, 114 S. Ct. at 2521.

[113] Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 667 (Fla. 1993).

[114] *Operation Rescue*, 626 So. 2d at 667.

[115] *Id.*

entering the clinic or its property, interfering with access to the clinic, or "congregating, picketing, patrolling, demonstrating or entering" the public or private property within thirty-six feet of the clinic.[116] It also restricted protestors from projecting sound and visual images into the clinic during certain hours, approaching patients of the clinic within 300 feet of the property without the patients' consent, and protesting within 300 feet of clinic employees' homes.[117]

The injunction was upheld by the Florida Supreme Court on the grounds that it was content neutral and "narrowly-tailored to serve a significant government interest, . . . [leaving] open ample alternative channels of communication."[118] In a separate challenge to the same injunction, however, the Eleventh Circuit, in *Cheffer v. McGregor*,[119] struck down the injunction, finding it to be content based and neither necessary to serve a compelling state interest, nor narrowly drawn to achieve that end.[120] In granting certiorari in *Madsen*,[121] the Supreme Court sought to resolve the conflict between the state and federal courts.[122]

Not surprisingly, the Court was divided, issuing four opinions, and upholding some parts of the injunction while striking down others.[123] Chief Justice Rehnquist, writing for the majority, started his analysis by assessing whether the injunction was content or viewpoint based.[124] Recognizing that injunctions, by their nature, target a particular group, the Chief Justice said that this alone was not enough to make such a measure content based.[125] In this case, the majority found that the restrictions were "incidental to the . . . anti-

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[116] *Id.* at 679.

[117] *Madsen*, 114 S. Ct. at 2522-23.

[118] *Operation Rescue*, 626 So. 2d at 671.

[119] 6 F.3d 705, 711 (11th Cir. 1993).

[120] *Id.*

[121] Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 907 (1994).

[122] *Madsen*, 114 S. Ct. at 2523.

[123] Chief Justice Rehnquist wrote for the majority. *Id.* at 2521. Justice Souter filed a concurring opinion. *Id.* at 2531. Justice Stevens filed an opinion concurring in part and dissenting in part. *Id.* at 2533. Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, in which Justices Kennedy and Thomas joined. *Id.* at 2534.

[124] *Id.* at 2523.

[125] *Id.* at 2519.

abortion message," and that there was no evidence to show that pro-abortion protesters engaging in comparable activity would not have been subjected to a similar injunction.[126] Essentially, the protesters were being restricted not because they were protesting abortion, but because they were protesting in violation of the law and injuring others.[127] Therefore, the Court concluded that the injunction was indeed content neutral.[128]

Typically, when a restriction on speech is found to be content neutral, the Court has followed the traditional intermediate scrutiny standard.[129] That standard involves determining whether the restriction is "narrowly tailored to serve a significant governmental interest," and leaves sufficient alternative avenues of communication available to the speaker.[130] In *Madsen*, however, the majority distinguished statutory or ordinance-based restrictions—where this standard has often been applied—from injunctive restrictions.[131] The majority reasoned that "[o]rdinances represent a legislative choice regarding the promotion of particular societal interests," and apply to society as a whole rather than a particular "minority."[132] Injunctions, however, "carry greater risks of censorship and discriminatory application than do general ordinances."[133] The majority, therefore, explained that a "more stringent" standard was appropriate for injunctive restrictions on speech.[134]

In articulating this "stringent standard," the Court looked to the general principle "that injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs."[135] Rather than simply requiring that the relief be "narrowly tailored," the Court said that the test should be

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[126] *Id.* at 2524.

[127] *Madsen*, 114 S. Ct. at 2523.

[128] *Id.* at 2524.

[129] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Frisby v. Schultz, 487 U.S. 474, 480 (1988); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[130] *See, e.g.*, *Ward*, 491 U.S. at 791.

[131] 114 S. Ct. at 2524.

[132] *Id.* at 2519.

[133] *Id.*

[134] *Id.*

[135] *Id.*

"whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[136]

The majority quickly determined that "significant government interests" existed in this case,[137] including the State's interests in protecting a woman's constitutional right to abortion under *Roe v. Wade*,[138] in promoting "public safety and order," and in preserving "medical privacy"—just as there had been an interest in protecting residential privacy in *Frisby v. Schultz*.[139] Under the Court's First Amendment test for injunctions, however, it was necessary to determine whether the various provisions of the injunction were restricting "no more speech than necessary."[140]

In performing this analysis, the Chief Justice broke the injunction down into separate elements, applying the test to each restriction. Looking first at the ban on protests within the thirty-six foot buffer zone, he recognized that this zone encompassed both private and public property.[141] The restriction on protest on public property—namely, the road providing access to the clinic—was designed to protect access to and from the clinic.[142] Although the majority recognized that the "no more speech than necessary" requirement might be read to mandate a smaller, or even no buffer zone, it upheld that portion of the injunction, and deferred to the state court's familiarity with the facts of the dispute, particularly in light of the failure of the first order, which provided for no buffer zone.[143] However, in the absence of evidence that it was necessary to include private property within the buffer zone to protect access to the clinic, the Court invalidated that part of the injunction.[144]

The Court next looked at the restrictions on sound and visual images, once again choosing to uphold one type of restriction, but not

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[136] *Madsen*, 114 S. Ct. at 2525.

[137] *Id.* at 2526.

[138] 410 U.S. 113 (1973); *see Madsen*, 114 S. Ct. at 2526.

[139] *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988) (upholding law banning targeted residential picketing); *Madsen*, 114 S. Ct. at 2526.

[140] *Madsen*, 114 S. Ct. at 2526.

[141] *Id.* at 2526-27.

[142] *Id.* at 2527.

[143] *Id.*

[144] *Id.* at 2527-28.

an other. With respect to the sound restrictions, the Court cited previous decisions in which it had recognized the particular need for peace and quiet in the area of hospitals and other medical facilities "'where pleasing and comforting patients are principal facets of the day's activity,'"[145] as well as the State's right to "'turn . . . down'" sound, even if it conveys First Amendment-protected speech.[146] Thus, the Court upheld the Florida court's restrictions on sound within earshot of the clinic.[147]

But the Court refused to extend that same conclusion to visual images. The majority found that the "broad prohibition on all 'images observable' burdens more speech than necessary to achieve the purpose of limiting threats to clinic patients or their families."[148] In distinguishing visual images from sound, the majority noted that "it is much easier for the clinic to pull its curtains than for a patient to stop up her ears."[149]

The majority also found the provision preventing protesters from approaching patients within 300 feet of the clinic without their consent to be overbroad.[150] The Justices were concerned that the injunction prohibited "*all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be."[151] This broad prohibition clashed with the principle that "'citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'"[152]

The final provision analyzed by the Court was the prohibition on demonstrating within 300 feet of the residences of clinic staff.[153] The Court distinguished the restriction from the one it had upheld in

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[145] *Madsen*, 114 S. Ct. at 2528 (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring)).

[146] *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).

[147] *Id.* at 2528.

[148] *Id.* at 2529.

[149] *Id.*

[150] *Madsen*, 114 S. Ct. at 2530.

[151] *Id.* at 2529.

[152] *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1987)).

[153] *Id.*

Frisby.[154] In *Frisby*, recognizing "the unique nature of the home, [as] 'the last citadel of the tired, the weary, and the sick,'" the Court upheld a restriction on "'focused picketing,'" targeting a particular residence.[155] The *Madsen* Court, however, found that the city's 300 foot zone was much too broad.[156] Instead of the 300 foot prohibition, the Court suggested that "a limitation on the time [and] duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result."[157]

The majority opinion faced partial dissents from both ideological directions. Justice Stevens concurred with the majority's judgment that the injunction was content neutral, and with its analysis of the "in concert" language.[158] He came to the opposite conclusion on what standard to apply, however, arguing that injunctions should be judged "by a more lenient standard than legislation."[159] Justice Stevens explained that "legislation is imposed on an entire community, regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty—the normal consequence of illegal activity."[160] Based on this standard, and on the trial court's finding of the harm caused by protesters' harassment of patients, Justice Stevens argued that the 300 foot "no approach" zone around the clinic

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[154] *Madsen*, 114 S. Ct. at 2529; *see* Frisby v. Schultz, 487 U.S. 474, 487 (1988).

[155] 487 U.S. at 487 (quoting Gregory v. Chicago, 379 U.S. 111, 125 (1969) (Black, J., concurring)).

[156] 114 S. Ct. at 2530.

[157] *Id.* The protesters in *Madsen* also challenged the injunction as being "vague and overbroad." *Id.* Specifically, they protested language making the injunction applicable to the named parties. *Id.* The Court rejected this claim on two grounds. First, it found that the petitioners had no standing to bring such a claim because they themselves *were* named parties. *Id.* Second, the Court noted that the injunction was not overbroad in prohibiting conduct, but rather was "simply directed at unnamed parties who might later be found to be acting 'in concert' with the named parties," in a manner typically utilized in injunctive orders. *Id.*

[158] *Id.* at 2531 (Stevens, J., concurring in part, dissenting in part).

[159] *Id.*

[160] *Id.*

was valid.[161]

Justice Scalia, meanwhile, in an opinion joined by Justices Kennedy and Thomas, went to the other extreme, arguing that strict scrutiny should apply to injunctions, including content-neutral injunctions.[162] Justice Scalia's dissent, lengthy and often stinging, was based in large measure on his view that the majority was allowing its views on abortion to influence the case.[163] Scalia took this position despite the fact that the author of the majority opinion, Chief Justice Rehnquist, had joined with him in voting to overrule *Roe v. Wade* on several occasions.[164]

With respect to the standard to be applied to content-neutral injunctions, Justice Scalia suggested several reasons why strict scrutiny was appropriate. First, he argued that even if an injunction does not attack "content as content," the very fact that it is inherently directed toward a specific group of people means it will restrict a particular point of view.[165] Second, he maintained that by leaving such decisions to individual judges rather than legislators, the risk of unwarranted restriction is greater, particularly if such a judge is "chagrined" because the particular group has already disobeyed her orders.[166] And finally, he explained that an injunction is a more powerful weapon than a statute because it subjects a violator to contempt proceedings.[167] Although Justice Scalia admitted that an injunction may be challenged as unconstitutional on appeal, as was

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[161] *Madsen*, 114 S. Ct. at 2532-33 (Stevens, J., concurring in part, dissenting in part). Justice Stevens maintained that the other portions of the injunction concerning sound, images, and residential picketing were not properly before the Court, although he suggested that he was inclined to agree with the majority on the noise and image provisions. *Id.* at 2531-33.

[162] *Id.* at 2538 (Scalia, J., concurring in part, dissenting in part).

[163] *Id.* at 2535.

[164] *See* Planned Parenthood of Southeast Pa. v. Casey, 112 S. Ct. 2791, 2855-56 (1992) (Rehnquist, J., concurring in part, dissenting in part) (voting to erode *Roe* by stating that the right to choose to have an abortion, because it involves the taking of a potential life, should be subject to a balancing test rather than strict scrutiny); Rust v. Sullivan, 500 U.S. 173, 190 (1991) (eroding *Roe* by approving the withholding of government-funded abortion family planning after concluding that it is not a violation of guaranteed constitutional rights).

[165] *Madsen*, 114 S. Ct. at 2538-39 (Scalia, J., concurring in part, dissenting in part).

[166] *Id.* at 2539.

[167] *Id.*

done in this case, he cited the "collateral bar rule" enunciated in *Walker v. Birmingham*[168] for the proposition that a party charged with contempt for violating an injunction may not challenge its constitutionality.[169]

Scalia's dissent also criticized the manner in which the majority used, or failed to use, precedent to support its conclusions. He particularly focused on the Court's decision in *NAACP v. Clairborne Hardware, Inc.*,[170] where the Court explained that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."[171] Scalia claimed that by allowing the use of the *Madsen* injunction against a broad group of pro-life protesters, the Court was acting contrary to its ruling in *Clairborne Hardware*.[172] The majority responded, however, that by applying its "burden no more speech than necessary" standard, the Court adhered to the principle of *Clairborne Hardware*.[173]

Finally, Justice Scalia maintained that the injunction was unconstitutional even if it was based on the majority's new test.[174] He claimed that the majority had not really demonstrated that the interests at stake were "significant" because there was no violation of any specific state law or ordinance, and, in his view, no violation of the earlier injunction had taken place.[175] Additionally, the injunction did not prohibit only as much speech as was truly necessary, according to Justice Scalia, because other alternatives, such as

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[168] 388 U.S. 307 (1967).

[169] *Madsen*, 114 S. Ct. at 2539 (Scalia, J., concurring in part, dissenting in part). Justice Scalia also argued that the injunction was not content neutral, based largely not on the injunction itself, but on the way it had allegedly been applied only against pro-life protesters. *Id.* at 2539-40. As Justice Souter noted in his concurring opinion, however, the trial court indicated that the question of to whom the injunction was to properly apply was to be determined on a case-by-case basis, and *not* based upon viewpoint. *Id.* at 2530 (Souter, J., concurring).

[170] 458 U.S. 886 (1982).

[171] *Id.* at 908.

[172] *Madsen*, 114 S. Ct. at 2541-43 (Scalia, J., concurring in part, dissenting in part).

[173] *Id.* at 2525.

[174] *Id.* at 2544 (Scalia, J., concurring in part, dissenting in part).

[175] *See id.* at 2544-49.

limiting the number of protesters in certain areas, could have been attempted.[176]

Madsen clearly presented an exceptionally difficult case for the Court.[177] By adopting a standard somewhere in between strict and intermediate scrutiny, and by employing a Solomonic "split the baby"[178] approach to the injunction itself, the Court was able to achieve a relatively clear majority opinion, and to permit both sides to claim some measure of vindication.[179] The long-term effects of the ruling, however, remain uncertain. The Court's approach will necessarily make each future case of this variety—whether involving abortion protests, labor pickets, or some other activity—highly dependent on the particular facts involved.[180] It will also put a premium on the judgments and findings reached by trial courts on such questions as whether injunctions limit only as much speech as is necessary, a question on which the Supreme Court Justices obviously did not agree.

The second abortion-related case with free speech implications considered by the Court in the 1993-94 term was *NOW v. Scheidler*.[181] The case began when the National Organization for Women (NOW), sued respondents Joseph Scheidler, the Pro-Life Action Network, and others in federal court, alleging violations of the Sherman Act[182] and the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act

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[176] *Id.* at 2548-49.

[177] *See* Steven P. Bann, *Anti-Abortion Injunction Modified in Light of New Stricter Standard*, N.J. L.J., Dec. 5, 1994, at 49; David Cole, *The Perils of Pragmatism*, N.J. L.J., Aug. 22, 1994, at 8 (discussing the Court's move from a reliance on the distinction between content-neutral and content-based regulations to "a more pragmatic, case-by-case balancing of the competing interests at stake").

[178] *See* 1 *Kings* 3:16.

[179] *See Constitutional Law Scholars Assess Impact of Supreme Court's 1993-94 Term*, 63 U.S.L.W. 2229, 2240 (Oct. 18, 1994) (discussing experts' opinions that the Court's 1993-94 term, including its decision in *Madsen*, were "cautious and middle-of-the-road").

[180] *See Madsen*, 114 S. Ct. at 2523.

[181] 114 S. Ct. 798 (1994).

[182] Sherman Anti-Trust Act, Pub. L. No. 103-325, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1988)).

of 1970.[183] NOW claimed that the respondents were part of a "nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity."[184]

The district court dismissed the case as a matter of law, holding that, because the activities involved political, not economic, objectives, the Sherman Act did not apply.[185] It also dismissed the RICO claims brought under 18 U.S.C. § 1962(a) because the income alleged by petitioners was "in no way . . . derived from the pattern of racketeering alleged in the complaint."[186] The district court next held that petitioners failed to state a claim under 18 U.S.C. § 1962(c) because an economic motive is required for a RICO claim, and none existed here.[187] Finally, it dismissed the conspiracy claim under 18 U.S.C. § 1962(d) because the other RICO claims could not stand.[188]

The Seventh Circuit affirmed the dismissal of the petitioners' claims.[189] It adopted the district court's analysis of the claims under § 1962(a).[190] Regarding the § 1962(c) claim, it held that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO."[191] The court of appeals also affirmed the dismissal of the claim under § 1962(d).[192] The Supreme Court granted certiorari to resolve a conflict among the circuits on the putative economic motive requirement of §§ 1962(c) and 1962(d).[193]

Chief Justice Rehnquist wrote for a unanimous Supreme Court, which reversed the court of appeals, and held that RICO

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[183] Plaintiffs alleged violations of 18 U.S.C. §§ 1962(a), (c), and (d) (1988). *Scheidler*, 114 S. Ct. at 800.

[184] *Id.* at 801.

[185] NOW v. Scheidler, 765 F. Supp. 937, 941 (N.D. Ill. 1991).

[186] *Id.*

[187] *Id.* at 943.

[188] *Id.* at 944.

[189] NOW v. Scheidler, 968 F.2d 612, 630-31 (7th Cir. 1992).

[190] *Id.* at 625.

[191] *Id.* at 629.

[192] *Id.* at 630.

[193] NOW v. Scheidler, 113 S. Ct. 2958 (1993). Unlike the Seventh Circuit, the Third Circuit held that, if a predicate offense does not require an economic motive, RICO likewise requires no additional economic motive. Northeast Women's Ctr, Inc. v. McMonagle, 868 F.2d 1342, 1348-50 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

contains no economic motive requirement.[194] While respondents and several amici argued that the application of RICO to protesters might chill legitimate expression,[195] the Court declined to address the First Amendment issue.[196] The Court noted that "the question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise or racketeering activity has an overriding economic motive."[197]

Justice Souter, joined by Justice Kennedy, wrote a brief concurring opinion which discussed the First Amendment issues.[198] Souter dismissed the argument that, in order to avoid First Amendment issues, RICO should be construed to require economic motivation.[199] This argument was based on the principle of statutory construction that a law "'must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity.'"[200] However, Souter noted that this principle "applies only when the meaning of a statute is in doubt, and here the statutory language is unambiguous."[201]

Even if RICO's meaning were not clear, Justice Souter suggested that it would not follow that the statute ought to be read to include an economic-motive requirement because of free speech concerns.[202] He explained that such a requirement would be both overprotective and underprotective of expression.[203] It would be overprotective because "it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling."[204] On the other hand, it "might also prove to be underprotective, because entities engaging in vigorous but fully

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[194] *Scheidler*, 114 S. Ct. at 801. The Court's rationale as a matter of statutory interpretation, focused on the "plain language" of RICO, which was absent of any indication that an economic motive was required. *Id.* at 804.

[195] *Id.* at 806 n.6.

[196] *Id.*

[197] *Id.*

[198] *Id.* at 806 (Souter, J., concurring).

[199] *Scheidler*, 114 S. Ct. at 807 (Souter, J., concurring).

[200] *Id.* at 806 (quoting Lucas v. Alexander, 279 U.S. 573, 577 (1929)).

[201] *Id.* at 807.

[202] *Id.*

[203] *Id.*

[204] *Scheidler*, 114 S. Ct. at 807 (Souter, J., concurring).

protected expression might fail the proposed economic-motive test (for even protest movements need money) and so be left exposed to harassing RICO suits."[205] Finally, Justice Souter maintained that an economic-motive requirement is unnecessary because free speech claims "may be raised and addressed in individual RICO cases as they arise."[206] Souter specifically pointed out that nothing in the Court's opinion would prevent a future RICO defendant from raising a First Amendment defense, and that it is important "to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake,"[207] although the Court's opinion did not address these issues.[208] As Justice Souter's opinion emphasized, the Court has left for another day the question of the potential conflict between RICO and the First Amendment,[209] an issue that surely will arise in individual RICO cases.

B. Free Speech Rights of Government Employees: Waters v. Churchill

In its decision in *Connick v. Myers*,[210] the Supreme Court established a two-part test for deciding whether a government employee's speech deserves First Amendment protection.[211] Under the test, speech is protected if it is on "a matter of public concern,"[212] and "the employee's interest in expressing herself on [the] matter [is not] outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[213] Inherent in the *Connick* test is the presumption that an employer and employee can

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[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.* at 806 n.6.

[209] *Scheidler*, 114 S. Ct. at 807.

[210] 461 U.S. 138 (1983).

[211] *Id.* at 142.

[212] *Id.* at 146.

[213] *Waters*, 114 S. Ct. at 1889 (quoting *Connick*, 461 U.S. at 142 (quoting Pickering v. Board of Educ. of Township High Sch. Dist., 391 U.S. 563, 568 (1968))).

agree at least on the content of the speech they are fighting over. In *Waters v. Churchill*,[214] the Court was asked to decide what to do when the content of an employee's speech is in dispute.[215] To put it in Justice O'Connor's terms, *Waters* required the Court to decide the "factual basis" for application of the *Connick* test.[216]

The government employee in *Waters* was Cheryl Churchill, who worked in the obstetrics department of a public hospital in Illinois.[217] She had been overheard making certain remarks to a fellow employee, who was considering transferring to the obstetrics department.[218] The alleged content of these remarks was later reported to several management officials, including Churchill's supervisor, Cynthia Waters.[219]

According to Waters, Churchill had complained about the obstetrics department, saying that it was generally a "bad place . . . to work."[220] Waters considered this an attempt by Churchill to discourage her colleague from transferring to the department, and thus grounds for termination.[221] Churchill claimed, however, that her comments had largely related to her concerns about hospital policy, and the resultant threat to patient care.[222] Furthermore, she claimed that she had actually *urged* her colleague to transfer to obstetrics because she was concerned about staff shortages, and the negative effect they were having on the department.[223] Although both parties claimed to have witnesses to support their contentions, Churchill was fired.[224]

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[214] 114 S. Ct. 1878 (1994).

[215] *Id.* at 1884.

[216] *Id.*

[217] *Id.* at 1882.

[218] *Id.*

[219] *Waters*, 114 S. Ct. at 1882-83.

[220] *Id.* at 1882.

[221] *Id.*

[222] *Id.* at 1883.

[223] *Id.*

[224] *See Waters*, 114 S. Ct. at 1882-83. The conversation was overheard, in part, by two nurses, MaryLou Ballew and Jean Welty, and by Dr. Thomas Koch. *Id.* at 1882. While Ballew's version of the conversation supported Water's view, Koch's and Welty's recollections of the conversation supported Churchill's. *Id.* at 1882-83.

After exhausting her remedies within the hospital,[225] Churchill filed suit in federal court, claiming she had been fired in violation of her First Amendment rights under *Connick*.[226] The district court rejected Churchill's claim, declaring that, even according to her version of events, the speech did not relate to "a matter of public concern," and even if it had, "its potential for disruption nonetheless stripped it of First Amendment protection."[227]

The Seventh Circuit reversed,[228] finding that the speech, "viewed in the light most favorable" to Churchill, was on a matter of public concern as defined by *Connick*.[229] The court further concluded that the inquiry must center on what the employee *actually* said, not what the employer *thought* she said.[230] "If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct . . . the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental."[231]

The Supreme Court vacated the Seventh Circuit's decision, and remanded the case,[232] but could not reach a majority position on the issue of which standard should have been applied by the trial court. Justice O'Connor wrote for a plurality of four Justices, and maintained that the employer's factual conclusion on the *Connick* issue should be upheld, as long as it was reached in a "reasonable" fashion.[233] Justice Souter, a member of the plurality, also wrote a concurring opinion emphasizing that an employer need not only carry out a reasonable investigation of a third-party report, but must also

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[225] *Id.* The president of the hospital apparently met with Churchill, and then reviewed reports by Waters and another management employee before rejecting Churchill's grievance. *Id.*

[226] Churchill v. Waters, 731 F. Supp. 311, 322 (C.D. Ill. 1990).

[227] *Waters*, 114 S. Ct. at 1883-84.

[228] Churchill v. Waters, 977 F.2d 1114, 1116 (7th Cir. 1992).

[229] *Id.* at 1127. The court of appeals described the public concern as "the hospital's [alleged] violation of state nursing regulations as well as the quality and level of nursing care it provides its patients." *Id.* at 1122.

[230] *Id.* at 1127.

[231] *Id.*

[232] *Waters*, 114 S. Ct. at 1891.

[233] *Id.* at 1884-91.

actually believe that report.[234] Justice Scalia, joined by Justices Kennedy and Thomas, concurred in the judgment, but argued that, as long as the hospital simply acted in good faith, it should have been protected from First Amendment liability.[235] Justice Stevens, who was joined by Justice Blackmun in dissent, agreed with the Seventh Circuit that the question of liability should be based on what a jury decides the employee actually said, regardless of the level of investigation instituted by the employer.[236]

As framed by Justice O'Connor in her plurality opinion, the issue in *Waters* was how "the factual basis for applying the [*Connick*] test—what the speech was, in what tone it was delivered, what the listener's reactions were—is to be determined."[237] Essentially, this meant the Court had to decide what procedural safeguards a government employer needed to follow before firing an employee for the content of his or her speech.[238] Although Justice Stevens urged the Court to require maximum safeguards,[239] and Justice Scalia urged only minimal safeguards,[240] the plurality ultimately chose a middle ground—a test that allows the employer to base a decision to reprimand or dismiss an employee on a "reasonable" belief that the employee's speech was not protected by the First Amendment.[241]

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[234] *Id.* at 1891-93 (Souter, J., concurring). Although there was no majority opinion, Justice Souter pointed out that, on remand, the trial court should clearly follow the plurality's standard. *Id.* at 1893. This is because a majority of the court agreed that the *most* an employer has to show is that he or she acted in a reasonable manner. *Id.* A different majority agreed that an employer who unreasonably believes an employee's speech was unprotected, and fires that employee will be held liable. *Id.* Thus, if the trial court were to apply either a higher standard or a lower standard than that urged by the plurality, it would be ignoring the will of a majority of the Court. *Id.*

[235] *Id.* at 1893-98 (Scalia, J., concurring).

[236] *Id.* at 1898-1900 (Stevens, J., dissenting).

[237] *Waters*, 114 S. Ct. at 1884 (citation omitted).

[238] *See id.* at 1886-88.

[239] *See id.* at 1898 (Stevens, J., dissenting) (arguing that the plurality opinion is "erroneous because it provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights").

[240] *See id.* at 1893 (Scalia, J., concurring) (arguing that broadening First Amendment procedural rights is "unprecedented, superfluous to the decision in the present case, unnecessary for the protection of public-employee speech on matters of public concern, and unpredictable in its application and consequences").

[241] *Id.* at 1889.

In rejecting the notion of maximum safeguards, Justice O'Connor noted that, while a procedure that employs both employer and jury review of an employee's speech might provide "more protect[ion]," it was not necessarily required under the Constitution.[242] Rather than attempting to articulate a general test as to what procedures are constitutionally required, the plurality suggested that this question should properly be answered "on a case-by-case basis . . . . [in light of] the particular context in which the question arises."[243] Factors to be considered include "the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase."[244]

In evaluating these factors, the plurality focused on the difference between the government as employer versus the government as sovereign in the First Amendment area. Justice O'Connor explained that, while the government as sovereign must narrowly target any permissible restrictions on speech, the government as employer may enact broader restrictions.[245] For example, a government supervisor may establish a general rule against being "'rude to customers,'" a standard which would clearly be too vague and violate the First Amendment if applied to the general public.[246] In short, the plurality maintained that:

> The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. . . . [Therefore, w]here the government is employing someone for the very purpose of effectively achieving its goals, such restrictions [in the name of efficiency] may well be appropriate.[247]

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[242] *Waters*, 114 S. Ct. at 1885.

[243] *Id.* at 1886.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Waters*, 114 S. Ct. at 1888. Although the Court did not describe this as a rational basis test, it might be so described. The plurality stated that, even though "[o]ne could make a respectable argument that political activity by government employees is

Based on this analysis, the plurality explained that the court of appeals had not given due deference to the government's role as employer.[248] If the factual question of what the employee said is based on what is determined de novo by a juror or other fact-finder, Justice O'Connor wrote, the government manager would be forced to follow courtroom evidentiary standards, ignoring hearsay, and personal knowledge of an employee's character and credibility.[249] To do otherwise would be to risk that a judge or jury would come to a different conclusion, leaving the manager or her government employer liable.[250] Justice O'Connor further stated that:

> What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay.[251]

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generally not harmful . . ., we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Id.* The plurality went on to say, however, that in certain situations "government employees, like any citizen, may have a strong, legitimate interest in speaking out on public matters. *Id.* In many situations the government may have to make a *substantial showing* that the speech is, in fact, likely to be disruptive before it may be punished." *Id.* (emphasis added).

[248] *Id.*

[249] *Id.* at 1891.

[250] *Id.* There was some question in *Waters* as to whether the manager would be immune from liability. However, the Court did not reach that question. *Id.*

[251] *Id.* at 1888. In fact, however, some of Justice O'Connor's concerns are effectively addressed by the Federal Rules of Evidence. *See* FED. R. EVID. 801(a). Under the Rules basic definition of hearsay, customer complaints would *not* be hearsay because the content of the customer's speech is not coming in for the "truth of the matter asserted," but just to show what the customer said. *See id.* 801(c) advisory committee's note. For example, if a waiter called a patron a "bad tipper," it would not matter whether or not the patron actually was a bad tipper, but only that the waiter said it. For this purpose only, such a statement would be admissible under the Federal Rules.

The plurality admitted that giving the employer the opportunity to use hearsay and the like would risk the possibility of erroneously punishing some protected speech by employees.[252] Justice O'Connor suggested, however, that the remedy for this is statutory or common law protection, not the Constitution.[253]

Despite its concern about the prerogative of a government employer, the plurality rejected Justice Scalia's suggestion that an employer need merely act in good faith to meet the requirements of the Constitution.[254] Rather, the plurality suggested a "reasonableness" standard, under which employers would be required to make a reasonable effort to discover the truth of allegations.[255] Under such a standard, it would be unreasonable for an employer to base a decision on no evidence at all, or on weak evidence, when stronger evidence is clearly available.[256] For example, "if . . . an employee is accused of writing an improper letter to the editor, [but] instead of just reading the letter, the employer decides what it said based on unreliable hearsay," this would be considered an unreasonable effort.[257] The plurality indicated that, in general, an employer should be required to utilize the degree of care "that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case."[258]

The plurality also rejected Justice Stevens' argument that the "reasonable employer" test "provides less protection for a

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[252] *Waters*, 114 S. Ct. at 1888.

[253] *Id.* at 1890.

[254] *Id.* at 1889.

[255] *Id.*

[256] *Id.*

[257] *Waters*, 114 S. Ct. at 1889.

[258] *Id.* In articulating this standard, the plurality distinguished *Waters* from cases like Pickering v. Board of Educ., 391 U.S. 563 (1968), Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), and *Connick*, where the focus had been on the "intent" of the employer to discriminate. *Waters*, 114 S. Ct. at 1889. The plurality noted that in those cases, the employers had known the true content of the employee's speech, and simply had to decide whether they should or could fire the employee because of that content. *Id.* However, the test in *Waters* goes to the employer's attempt to find out the relevant information in the first place, not the subsequent reaction to that information. *See id.* (stating that in none of these cases was the issue of what should happen if the employer holds an erroneous and unreasonable belief about what the employee said).

fundamental constitutional right than the law ordinarily provides for less important rights."[259] In rejecting Justice Stevens' argument, the plurality stated:

> We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information. Where an employee has a property interest in her job, the only protection we have found the Constitution gives her is a right to adequate procedure.[260]

Applying its "reasonableness" analysis to the facts of *Waters*, the plurality explained that if the hospital management "really did believe" the story told by the employee who had considered transferring to obstetrics, based on a reasonable investigation—including employee interviews—and "fired Churchill because of it," then the employer should prevail.[261] However, because Churchill had raised a disputed issue of fact as to whether she was actually fired for other nondisruptive statements which could constitute protected speech, the Court remanded for further fact-finding below.[262]

Although a majority of the Justices did not expressly adopt the "reasonableness" standard, Justice Souter's concurring opinion correctly noted that in light of the voting lineup on the Court, the plurality's opinion is effectively binding on the lower courts.[263] By decisively rejecting Justice Scalia's "good faith" standard,[264] the Court had appropriately ensured that public employees will retain some measure of meaningful First Amendment protection, even when they and their employers disagree on the facts.[265] As the plurality pointed out, Justice Scalia's formulation would effectively import an intent requirement into the First Amendment—a requirement that Justice

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[259] *Waters*, 114 S. Ct. at 1890.

[260] *Id.*

[261] *Id.*

[262] *Id.* at 1891.

[263] *Id.* at 1893 (Souter, J., concurring).

[264] *See Waters*, 114 S. Ct. at 1889.

[265] *See id.*

Scalia has sought to impose on several occasions, but which the Court has generally rejected.[266]

By also rejecting the Seventh Circuit's standard, however, the Court's decision means that, at least in some situations, it is likely that public employees will be disciplined or fired for engaging in speech protected by the First Amendment. As Justice Stevens pointed out in his dissent, this will effectively provide less protection for First Amendment rights than for some contractual and statutory rights of employees.[267] *Waters* will clearly not be the last case to be considered by the Court concerning the free speech rights of public employees. It remains to be seen how the Court's "government as employer" approach will affect this and other decisions concerning government employees and the First Amendment.

C. Government Regulation of Speech on Private Property: City of Ladue v. Gilleo

In *City of Ladue v. Gilleo*,[268] the Court faced what it described as the "mirror image"[269] of the case of *Linmark Associates, Inc. v. Willingboro*.[270] In *Linmark*, the Court held unconstitutional an ordinance that prohibited residents from posting "For Sale" signs in their front yards.[271] In contrast, *Gilleo* concerned an ordinance that allowed "For Sale" and other commercial signs, but banned all others.[272] Included among these "others" were signs posted by Margaret Gilleo protesting the Persian Gulf war.[273]

Gilleo had initially placed a sign reading "Say No to War in

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[266] *Id.*; *see* Elliot M. Mincberg, *A Look at Recent Supreme Court Decisions: Judicial Prior Restraint and the First Amendment*, 44 HAST. L.J. 871, 874-75 (1993) (discussing Justice Scalia's attempts to impose an "intent" requirement in First Amendment cases).

[267] *Waters*, 114 S. Ct. at 1898 (Stevens, J., dissenting).

[268] 114 S. Ct. 2038 (1994).

[269] *See id.* at 2042.

[270] 431 U.S. 85 (1977).

[271] *Id.* at 95-97.

[272] 114 S. Ct. at 2040.

[273] *Id.*

the Persian Gulf" on her front lawn.[274] When this sign "disappeared," she put up another, which was subsequently knocked down.[275] When she complained to police, she was told that such signs were illegal in Ladue.[276] Gilleo went to the City Council and asked for a "variance" by which the Council would waive the anti-sign ordinance for purposes of the "public interest."[277] Gilleo was turned down, and she subsequently filed a suit in federal court, claiming that the ordinance violated her First Amendment free speech rights.[278]

The trial court issued a preliminary injunction against the ordinance, and in response, the City Council passed a new ordinance banning all signs with the exception of "residential identification signs," signs advertising property "for sale, lease or exchange," commercial signs in commercial districts and on gas stations, and signs "for churches, religious institutions, and schools."[279] In a statement of purpose, the Council justified the ordinance on aesthetic grounds.[280]

The district court found the new ordinance unconstitutional,[281] and the Eighth Circuit affirmed,[282] on the basis that the ordinance was a "content-based" regulation treating commercial speech more favorably than noncommercial speech, and that the need to protect such speech was not outweighed by Ladue's "substantial," but not "compelling," interests.[283] Justice Stevens wrote for a unanimous Supreme Court in affirming the lower court decision,[284] with Justice O'Connor writing a concurring opinion.[285]

Justice Stevens' opinion began by looking at the Court's

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[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Gilleo*, 114 S. Ct. at 2040.

[278] Gilleo v. City of Ladue, 774 F. Supp. 1559 (E.D. Mo. 1991).

[279] *Gilleo*, 114 S. Ct. at 2041.

[280] *See id.*

[281] *Gilleo*, 774 F. Supp. at 1562-63.

[282] Gilleo v. City of Ladue, 986 F.2d 1180, 1184 (8th Cir. 1993).

[283] *Id.* at 1182, 1183-84.

[284] *Gilleo*, 114 S. Ct. at 2040.

[285] *Id.* at 2047-48 (O'Connor, J., concurring).

decision in *Metromedia, Inc. v. City of San Diego*.[286] In that case, the Court held unconstitutional a city ordinance banning all off-site advertising and on-site noncommercial advertising, despite San Diego's reliance on an "aesthetics" justification.[287] As Justice Stevens pointed out, the plurality in *Metromedia, Inc.* judged the ordinance to be content based because it made a commercial/noncommercial distinction for on-site speech,[288] whereas Justice Brennan's concurring opinion in that case relied more generally on the "practical effect" of the ordinance, which was to totally ban noncommercial billboards.[289] Justice Stevens went on to distinguish the Court's decision in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,[290] where the Court upheld, on aesthetics grounds, a ban of signs on public property.[291] He noted that in coming to its decision, the Court distinguished the Los Angeles ordinance from one that might ban similar signs on private property.[292]

Thus in considering the Court's previous case law on the subject of anti-sign ordinances, Justice Stevens found two general principles, both of which could be drawn from *Metromedia, Inc.*[293] First, as the plurality in that case implied, measures which restrict "too little" speech may be unconstitutional because they "discriminate on the basis of the signs' messages."[294] But second, as Justice Brennan's concurrence in *Metromedia, Inc.* maintained, measures may also be successfully challenged if they prohibit "too much protected speech."[295]

Expanding on the "underinclusiveness" theory, Justice Stevens noted that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a

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[286] 453 U.S. 490 (1981); *Gilleo*, 114 S. Ct. at 2042-43.

[287] *Metromedia, Inc.*, 453 U.S. at 510-21.

[288] *Gilleo*, 114 S. Ct. at 2042; *Metromedia, Inc.*, 453 U.S. at 514-15.

[289] *Gilleo*, 114 S. Ct. at 2042; *Metromedia, Inc.*, 453 U.S. at 525-26 (Brennan, J., concurring).

[290] 466 U.S. 789 (1984); *Gilleo*, 114 S. Ct. at 2043.

[291] *Gilleo*, 114 S. Ct. at 2043; *Taxpayers for Vincent*, 466 U.S. at 816.

[292] *Gilleo*, 114 S. Ct. at 2043.

[293] *Id.*

[294] *Id.*

[295] *Id.*; *Metromedia, Inc.*, 435 U.S. at 521 (Brennan, J., concurring).

debatable public question an advantage in expressing its views to the people.'"[296] He recognized that the City of Ladue could raise a potentially valid argument against the underinclusiveness notion because of its claim that the exemptions were "only adventitiously connected with content," and were based on a "unique public need[] to permit certain kinds of speech."[297] But even if this explanation had been satisfactory on "underinclusiveness" grounds, Justice Stevens explained, it only strengthened the argument that the ordinance was "overinclusive."[298] As the Court noted: "Exemptions from an otherwise legitimate regulation of . . . speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government's rationale for restricting speech in the first place."[299]

Thus, while claiming an aesthetic need to ban signs, Ladue also admitted that some signs were "too vital to be banned."[300] If this were true, then the City might have to show why Gilleo's signs were not "too vital."[301] Recognizing that the City might cure this defect by simply banning all signs, the Court decided that it would "first ask whether Ladue [could] properly *prohibit* Gilleo from displaying her sign, and then, only if necessary, consider the separate question whether it was improper for the City to simultaneously *permit* other signs."[302] Significantly, at least according to Justice O'Connor, this analysis assumed arguendo that the City's ban was truly content neutral.[303]

Relying on its decision in *Linmark*, which found that an interest in preventing "white flight" was not great enough to justify

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[296] *Gilleo*, 114 S. Ct. at 2043 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)).

[297] *Id.* at 2044.

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Gilleo*, 114 S. Ct. at 2044.

[302] *Id.* (emphasis added).

[303] *Id.* (O'Connor, J., concurring). It was this change in emphasis which prompted Justice O'Connor to write her concurrence, which attempted to bolster the continued validity of content-based/content-neutral analysis. *See infra* notes 315-19 and accompanying text (discussing Justice O'Connor's concurrence).

a prohibition on "For Sale" signs,[304] the Court recognized that there is an even greater need to protect "absolutely pivotal speech," such as that protesting an imminent war.[305] This was especially true where the practical impact of the ordinance was even greater than in *Linmark*; the impact of this ordinance was, essentially the banning of all political signs.[306]

What particularly troubled the Court was what had troubled Justice Brennan in *Metromedia, Inc.*—the fact that the ordinance had the effect of "foreclos[ing] an entire medium of expression."[307] The Court rejected the City's argument that residents may rely instead on media such as handbills, telephone calls or bumper stickers.[308] The Court noted that this would not truly "leave open an ample alternative channel[] for communication,"[309] particularly because the very fact a sign is displayed at one's home can have a unique and distinct meaning in and of itself:

> A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.[310]

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[304] 431 U.S. 85 (1977).

[305] *Gilleo*, 114 S. Ct. at 2044-45.

[306] *Id.* at 2045.

[307] *Id.* at 2046; *see Metromedia, Inc.*, 453 U.S. at 525-26 (Brennan, J., concurring) (arguing that "the practical effect of the San Diego ordinance is to eliminate the billboard as an effective medium of communication").

[308] *Gilleo*, 114 S. Ct. at 2046.

[309] *Id.*

[310] *Id.* The Court also recognized the value of such residential signs as a "cheap and convenient form of communication," allowing a citizen who cannot afford to print up handbills or place television advertisements nevertheless express him or herself effectively, as well as the fact that such signs are likely the most effective way to target a message at one's immediate neighbors. *Id.*

The Court concluded by recognizing the special respect due to "individual liberty in the home," and particularly the right to speak there.[311] Although the government has an obvious need to regulate "various competing uses," Justice Stevens wrote, "most Americans would be understandably dismayed . . . to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views."[312] The Court recognized that such signs may indeed constitute "visual clutter," and in certain circumstances, such as signs posted for a fee, may be regulated.[313] In its current, broad form, however, the ordinance clearly violated the First Amendment.[314]

Justice O'Connor's concurring opinion expressed some concern about the Court's assumption "arguendo" that the ordinance was content neutral.[315] Noting that, in the past, the Court had begun its evaluation of such regulations by determining whether they were content based or content neutral, she suggested that this analysis might have been more appropriate in *Gilleo*.[316] She acknowledged that exclusive reliance on such an approach has been criticized by Justice Stevens and others, but maintained that it has substantial merits, both practical and theoretical, outweighing its flaws.[317]

As reflected in Justice O'Connor's concurrence, the result in *Gilleo* was probably inevitable, regardless of the form of analysis utilized.[318] Yet it is this very inevitability that arguably bolsters Justice Stevens' approach. Where government bans *purely* political speech on *private* property, it should not matter whether the government's action is content based or content neutral; there should be no significant *or* compelling state interest that could justify such a prohibition of pure political speech.[319] Viewed in this way, Justice Stevens' approach has the potential to make an important contribution to First Amendment jurisprudence. Rather than *replacing* content

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[311] *Id.* at 2047.

[312] *Id.*

[313] *Gilleo*, 114 S. Ct. at 2047.

[314] *Id.*

[315] *Id.* at 2047-48 (O'Connor, J., concurring).

[316] *Id.* at 2048.

[317] *Id.* at 2047-48.

[318] *See* 114 S. Ct. at 2048 (O'Connor, J., concurring).

[319] *See id.* at 2047.

based analysis, his approach arguably provides an *additional* method which can be utilized in some cases to analyze government rules that limit speech. Properly applied, the net result may well be to enhance protection for the First Amendment.

D. Regulation of Professional Advertising: Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy

In *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*,[320] the Supreme Court was asked to decide whether a state could prohibit a licensed professional from listing certain credentials in her advertisement, without violating First Amendment protections on commercial speech.[321] In 1992, Silvia Ibanez, a practicing member of the Florida Bar, was licensed by the Florida Board of Accountancy as a Certified Public Accountant (CPA), and was authorized by a private organization, known as the Certified Financial Planner Board of Standards, to use the title "Certified Financial Planner" (CFP).[322] She used both her CPA and CFP designations in her legal advertising, and on her law office stationary and business cards.[323] Based on an anonymous tip, the State Board charged Ibanez with violating state law prohibiting "fraudulent, false, deceptive, or misleading" advertising by using the designation CPA which "implied that she abides by the provisions of the [Florida Public Accountancy Act]," and by using the designation CFP which had not been granted Board approval.[324]

Ibanez claimed that she was practicing law, not accountancy, and thus was not under the Board's jurisdiction.[325] Additionally, she argued that her use of CPA and CFP constituted truthful, commercial

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[320] 114 S. Ct. 2084 (1994).

[321] *Id.* at 2087.

[322] *Id.* at 2085.

[323] *Id.* at 2086.

[324] *Id.* at 2087. The Board also charged her with practicing in an unlicensed firm, but this charge was dropped before the proceedings were completed. *Id.*

[325] *Ibanez*, 114 S. Ct. at 2087.

speech for which she could not properly be sanctioned.[326] But despite her arguments, and even despite a recommendation by a Board hearing officer that all charges against her be dropped, the Board found Ibanez guilty on both counts.[327] The Board's decision was upheld by the state appellate court.[328]

The Supreme Court granted certiorari,[329] and reversed the Board's decision.[330] Justice Ginsburg wrote for a unanimous Court on the CPA issue, and for a seven-two majority on the CFP issue.[331] Justice O'Connor, joined by Chief Justice Rehnquist, wrote a partial dissent.[332]

The Court's analysis, especially on the CPA issue, largely draws on prior precedent with respect to commercial speech. Justice Ginsburg began by reiterating the principle that "only false, deceptive or misleading commercial speech may be banned,"[333] and speech that does not fall in one of these categories may be restricted only "if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest."[334] In accord with prior commercial speech cases, the Court explained, it is not enough for the state to engage in "'speculation or conjecture,'" but rather it must show that the harms are real, and the proposed restrictions will "'alleviate them to a material degree.'"[335]

Justice Ginsburg's analysis of the CPA issue, which was supported by all nine Justices, was short and to the point. The Court rejected the claim that Ibanez's use of the term CPA was misleading

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[326] *Id.*

[327] *Id.* at 2088.

[328] Ibanez v. Florida Dep't of Professional Regulation, Bd. of Accountancy, 621 So. 2d 435, 435 (Fla. App. 1993).

[329] Ibanez v. Florida Dep't of Professional Regulation, 114 S. Ct. 751 (1994).

[330] *Ibanez*, 114 S. Ct. at 2088.

[331] *Id.* at 2086.

[332] *Id.* at 2092 (O'Connor, J., dissenting in part, concurring in part).

[333] *Id.* at 2088 (citing Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 638 (1985)).

[334] *Id.* (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).

[335] *Ibanez*, 114 S. Ct. at 2089 (quoting Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993)).

because she had claimed to be outside the Board's jurisdiction.[336] Initially, the Court noted that Ibanez was no longer claiming to be outside the Board's jurisdiction, and that even if she had been, the First Amendment would not allow her to be sanctioned for such a belief.[337] In addition, the Court explained that it was not enough that Ibanez said she was unwilling to comply with the Board's regulations.[338] Rather, the Board was required to provide specific evidence that she did not comply.[339] Because the Board did not present this evidence, and because Ibanez truly held a CPA license, the Court could not "imagine how consumers [would] be misled by her truthful representation to that effect."[340]

The CFP issue raised different questions because the State claimed that the use of the designation could mislead the public into believing that Ibanez was a state-certified financial planner.[341] In addressing this issue, both the majority[342] and the dissent[343] relied on the Court's 1990 decision in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*.[344] In that case, the Court held that "an attorney's use of the designation 'Certified Civil Trial Specialist By the National Board of Trial Advocacy' was neither actually nor inherently misleading."[345] In light of the "'complete absence of evidence of deception,'"[346] with respect to *Ibanez*, *Peel* was clearly applicable.[347] The Board nevertheless argued that the CFP designation was "'potentially misleading,' entitling the Board to 'enact measures short of a total ban to prevent deception or confusion.'"[348] But relying on *Zauderer v. Office of Disciplinary*

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[336] *Id.* at 2089.

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *Ibanez*, 114 S. Ct. at 2089.

[341] *Id.*

[342] *Id.* at 2089-92.

[343] *Id.* at 2092-94 (O'Connor, J., dissenting in part, concurring in part).

[344] 496 U.S. 91 (1990).

[345] *Ibanez*, 114 S. Ct. at 2089 (quoting *Peel*, 496 U.S. at 106).

[346] *Id.*

[347] *Id.*

[348] *Id.* at 2090 (citing Brief of Respondent at 33, (citing *Peel*, 496 U.S. at 116) (Marshall, J., concurring)).

Counsel of the Supreme Court of Ohio[349] and *Edenfield v. Fane*,[350] the Court rejected this argument, stating that use of words like "potentially misleading" does not fulfill the State's burden to show that restrictions are necessary to alleviate *real* harms.[351] As the majority explained, the Board produced no such evidence.[352]

On the facts of the case, the majority also rejected the State's argument that it should be allowed to require at least that a professional include a lengthy disclaimer on her advertising, letterhead, or business cards explaining the origin of a particular designation.[353] While expressing no general opinion in this area, the Court found that the disclaimer described by the Board was so broad that it "effectively rule[d] out notation of the 'specialist' designation on a business card or letterhead, or in a yellow pages listing."[354]

Justice O'Connor's opinion disagreed with the majority on the CFP issue. She maintained that the use of the term "certified" was potentially misleading, and that in *Peel*, the facts stated on the attorney's letterhead were "true and verifiable," so that, at the very least, a required disclaimer was justified in *Ibanez*.[355] As the majority explained, however, Ibanez's CFP claim was as easily verifiable as the "certified" civil trial specialist credential in *Peel*, and Ibanez was duty-bound under ethical rules to supply reference

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[349] 471 U.S. 626, 648-49 (1985) (holding that only false, deceptive, or misleading commercial speech may be banned).

[350] 113 S. Ct. 1792, 1800 (1993) (holding that a state has the burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree").

[351] *Ibanez*, 114 S. Ct. at 2090.

[352] *Id.*

[353] *Id.*

[354] *Id.* at 2090-91. According to the Court, the Florida law prohibited the use of any "specialist" designation:

> Unless accompanied by a disclaimer, made "in the immediate proximity of the statement that implies formal recognition as a specialist"; the disclaimer must "stat[e] that the recognizing agency is not affiliated with or sanctioned by the state or federal government," and it must set out the recognizing agency's "requirements for recognition, including, but not limited to, educational, experience and testing."

Id. (quoting Brief of Respondent at 33-35) (citations omitted).

[355] *Id.* at 2092 (O'Connor, J., dissenting in part, concurring in part).

information if asked to do so.[356] In other circumstances, the majority's opinion leaves open the possibility that a disclaimer of the type endorsed by Justice O'Connor could be required.[357] But the Court's ruling in *Ibanez* makes clear that few restrictions on professional advertising and similar types of commercial speech will survive First Amendment scrutiny based simply on "'unsupported assertions'" of a mere potential to mislead.[358]

E. Government Regulation of Cable Television: Turner Broadcasting System, Inc. v. FCC

In *Turner Broadcasting System, Inc. v. FCC*,[359] the Supreme Court addressed a First Amendment challenge[360] to the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).[361] These provisions require local cable television companies to carry the signals of local broadcast stations on their systems.[362] The provisions were challenged on First Amendment grounds by a coalition of cable companies, who sued the United States and the FCC.[363] A statutorily designated three-judge court denied summary judgment, upholding the Act.[364] In a decision that produced five opinions, the Supreme Court reversed.[365]

In Part I of the opinion—the only part written for a unanimous Court—Justice Kennedy provided a lengthy description of cable television, of its relationship to the broadcast industry, and of the 1992 Cable Act.[366] Justice Kennedy first explained that with the need

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[356] *Ibanez*, 114 S. Ct. at 2090 n.9.

[357] *See id.* at 2088-89.

[358] *Id.* at 2092 (quoting *Zauderer*, 471 U.S. at 648-49).

[359] 114 S. Ct. 2445 (1994).

[360] *Id.* at 2451.

[361] 47 U.S.C. §§ 534-535 (Supp. 1992).

[362] *Id.* § 534(a).

[363] Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 35-36 (D.D.C. 1993).

[364] *Id.* at 51.

[365] *Turner*, 114 S. Ct. at 2451-52.

[366] *Id.* at 2451-56.

for "point-to-point" connections between cable operators and individual homes, the cable industry relies on a much greater physical infrastructure than broadcast television, and thus "may depend for its very existence upon express permission from local governing authorities."[367] Despite these physical limitations, Justice Kennedy noted that cable differs from broadcast television because it eliminates the "signal interference" associated with over-the-air broadcasts, and allows the consumer to receive a far greater number of channels than broadcast television.[368] Justice Kennedy also noted that unlike broadcast stations, the extreme cost of constructing cable systems and local franchising requirements mean that cable operators usually have a monopoly on cable in a particular geographic area.[369]

Because of the differences between cable and broadcast, the "increasing concentration of economic power" in the cable industry, and the fact that most of the more than sixty percent of households that subscribe to cable cannot "receive broadcast television services," Congress found that the cable industry had the ability to "endanger[] the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues."[370] Furthermore, because cable is in direct competition with broadcast, cable operators have an economic "incentive to harm broadcast competitors."[371] Justice Kennedy explained that the purpose of the 1992 Cable Act, was, therefore, to cushion some of the impact cable television was having on the broadcast industry.[372]

Under the 1992 Cable Act, cable television operators are required to carry a certain number of local commercial and public broadcast stations on their systems.[373] The number of stations operators are required to carry varies depending on the number of channels the cable system has, but, in actuality, almost all cable systems have some "must-carry" obligations.[374] These must-carry

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[367] *Id.* at 2451-52.

[368] *Id.* at 2452.

[369] *Id.* at 2454.

[370] *Turner*, 114 S. Ct. at 2454.

[371] *Id.*

[372] *Id.*

[373] 47 U.S.C. §§ 534-35 (Supp. 1992); *see Turner*, 114 S. Ct. at 2453.

[374] *Turner*, 114 S. Ct. at 2453-54.

provisions were controversial from inception, and, in the days before passage of the Act, lead to intense lobbying efforts from both cable and broadcast operators.[375] The Act finally became law on October 5, 1992, after Congress overrode President Bush's veto for the first, and only, time in his presidency.[376]

In upholding the 1992 Cable Act below, the three-judge court explained that the Act was simply regulatory legislation enacted for anti-trust and fair trade purposes.[377] The court rejected the cable companies' claim that the Act was content based, and thus subject to strict scrutiny.[378] Instead, the court found the Act to be content neutral, and it thus proceeded to analyze the Act under the intermediate scrutiny standard, ultimately concluding that "preservation of local broadcasting is an important governmental interest, and that must-carry provisions are sufficiently tailored to serve that interest."[379]

Justice Kennedy similarly began his legal analysis of the Act by assessing whether it was content based or content neutral.[380] All of the Justices, except Justice Stevens,[381] joined Justice Kennedy in specifically concluding that the less rigorous First Amendment standard applicable to broadcast television restrictions should not apply to cable.[382] Justice Kennedy noted that the justification for the less rigorous broadcast standard is that the number of broadcast frequencies requires the government to restrict broadcast stations.[383] This same limited channel capacity does not exist in the world of cable, Justice Kennedy explained, and thus that rationale for a less

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[375] *Id.* at 2454. *See generally* Paul Farki, *Closing the Cable Rate Loopholes; Prices Fall for Subscribers in 5 out of 7 Washington Area Communities*, WASH. POST, Aug. 5, 1994, at B1 (noting that capping cable prices through regulation achieved Congress's goal of pushing down the cost of cable television services).

[376] *See* Stuart N. Brotman, *The Curtain Rises on Clinton's FCC; Federal Communications Commission*, BUS. COMM. REV., Mar. 1993, at 16.

[377] Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 40 (D.D.C. 1993).

[378] *Id.* at 47-48.

[379] *Id.* at 45-47.

[380] *See Turner*, 114 S. Ct. at 2458.

[381] *See id.* at 2472-81 (Stevens, J., concurring).

[382] *Id.* at 2456.

[383] *See id.* at 2456-57.

rigorous standard does not exist.[384]

Justice Kennedy also rejected the government's argument that regulations on the cable industry, like any other industry-specific anti-trust regulations, should be treated under the "rational basis" standard.[385] Distinguishing *Turner* from cases where the Sherman Antitrust Act—a law of general application—has been applied to enterprises that are usually protected by the First Amendment,[386] Justice Kennedy noted that the 1992 Cable Act "single[s] out the press, or certain elements thereof, for special treatment [thus] 'pos[ing] a particular danger of abuse by the State.'"[387] Ultimately, Justice Kennedy concluded that "some measure of heightened First Amendment scrutiny [was] demanded."[388]

In determining that the Act should be considered content neutral, Justice Kennedy wrote for five members of the Court, losing the support of Justices O'Connor, Scalia, Thomas and Ginsburg, but picking up Justice Stevens' vote.[389] While recognizing that the Act certainly imposes a burden on the cable industry, and does distinguish between speakers in the television programming market, Justice Kennedy found no explicit reference in the Act to the content of speech.[390] Furthermore, he found no evidence that Congress had used the restrictions as "a subtle means of exercising a content preference."[391] As he pointed out, the must-carry benefit applies to all broadcasters regardless of content—"be they commercial or non-

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[384] *See id.* Justice Kennedy also rejected the government's argument that cable restrictions should be met with a less rigorous standard because, like broadcasters, cable operators suffer "market dysfunction" brought on by physical limitations. *Id.* at 2457. Justice Kennedy noted that the theory behind the less rigorous standard is not the "economic characteristics of the broadcast market," but the "special physical characteristics of broadcast transmission" that in turn limit the number of stations and require government regulation. *Id.* Justice Kennedy did acknowledge, however, that the "unique physical characteristics" of cable should be taken into account in some fashion in analyzing regulation of cable. *Id.*

[385] *Turner*, 114 S. Ct. at 2458.

[386] *Id.* (citing Lorain Journal Co. v. United States, 342 U.S. 143 (1951) & AP v. United States, 326 U.S. 1 (1945)).

[387] *Id.* (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987)).

[388] *Id.* at 2458.

[389] *Id.*

[390] *Turner*, 114 S. Ct. at 2460.

[391] *Id.*

commercial, independent or network-affiliated, English or Spanish language, religious or secular."[392]

Justice Kennedy rejected the argument that the motive behind the Act was Congress's preference for the type of programming found on broadcast television.[393] Rather, he credited the explanation found within the statute: "'There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.'"[394]

Justice Kennedy also discounted the claim, made by a dissenting judge below, that a "preference for broadcast stations '*automatically* entails content requirements.'"[395] The dissenting judge below, Judge Williams, had argued that, because broadcast programming, unlike that found on cable, was subject to statutory and regulatory content restrictions, Congress, by enacting the "must carry" provisions, had given itself control over what programming can and cannot be shown on cable.[396] Justice Kennedy found that this argument "exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming."[397] He noted that, despite the lower standard of scrutiny applicable to broadcast regulation, the FCC could not censor material or interfere with journalistic judgment.[398] Furthermore, despite its ability to inquire whether licensees had served the community, Justice Kennedy emphasized that the FCC had no power

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[392] *Id.* at 2463.

[393] *Id.* at 2461.

[394] *Id.* (quoting Conference Report S. 12, Cable Television Consumer Protection and Competition Act of 1992, 138 CONG. REC. H8308 § 2(a)(12) (statement of Rep. Dingell)). Justice Kennedy did acknowledge that one reason given for maintaining broadcast television was Congress's belief that it had some "intrinsic value," based on its ability to provide viewers with educational and informational programs. *Id.* at 2462. Nevertheless, Justice Kennedy did not find any evidence that Congress was denying that cable had a similar intrinsic value. *See id.* Rather, he believed that Congress was simply explaining why it was important that those citizens without access to cable continue to receive broadcast television. *Id.*

[395] *Turner*, 114 S. Ct. at 2462 (quoting *Turner*, 819 F. Supp. at 58 (Williams, J., dissenting)).

[396] *Turner*, 819 F. Supp. at 57-58 (Williams, J., dissenting).

[397] *Turner*, 114 S. Ct. at 2463.

[398] *Id.*

to "'impose . . . its private notions of what the public ought to hear.'"[399]

Justice Kennedy also rejected three other arguments raised by the cable companies in support of the claim that the must-carry provisions should be subjected to strict scrutiny.[400] Addressing the claim that the provisions "compel speech," Justice Kennedy distinguished *Miami Herald Publishing Co. v. Tornillo*[401] from *Turner*.[402] In *Tornillo*, the Court had held unconstitutional a state statute that required newspapers to give equal space to political candidates in order to reply to editorial criticisms.[403] Although the law had not actually prevented the newspaper from expressing its editorial view, the Court found the "practical effect" of the statute was to "deter newspapers from speaking in unfavorable terms about political candidates."[404] Unlike in *Tornillo*, however, Justice Kennedy found the 1992 Cable Act restrictions to be content neutral, because they were not triggered by speech of a particular content.[405] In addition, Justice Kennedy found no suggestion that the 1992 Cable Act would force the cable operators to change their programming, particularly as those same operators had been voluntarily carrying broadcast signals for many years.[406] Finally, he noted that unlike the newspaper market—where a speaker denied access by one publication may well be welcomed by another—cable markets tend to be monopolized, meaning the cable operators "can . . . silence the voice of competing speakers with a mere flick of the switch."[407]

The plurality also rejected the claim that strict scrutiny should apply because the 1992 Cable Act favors one set of speakers (broadcast programmers) over another (cable programmers).[408]

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[399] *Id.* (quoting Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7,293 (1960)).

[400] *Id.* at 2464.

[401] 418 U.S. 241 (1974).

[402] *Turner*, 114 S. Ct. at 2465.

[403] *Tornillo*, 418 U.S. at 258; *see Turner*, 114 S. Ct. at 2464-65.

[404] *Tornillo*, 418 U.S. at 256-57; *see Turner*, 114 S. Ct. at 2465.

[405] *Turner*, 114 S. Ct. at 2465.

[406] *Id.*

[407] *Id.* at 2466.

[408] *Id.*

Justice Kennedy made clear that the Court's decision in the campaign-financing case *Buckley v. Valeo*[409] did not mean that any restriction that muted the voice of one speaker to enhance the voice of another was subject to strict scrutiny.[410] Rather, the guiding principle behind the *Buckley* decision, according to the majority, was the Court's belief that the Constitution does not allow the legislature to prefer one group because of the substance of its speech.[411] The plurality explained that in *Buckley*, the government was trying to ensure that the "political speech of the wealthy did not drown out the speech of others."[412] Conversely, the must-carry provisions in *Turner* were not based on the content of the broadcaster's or cable operator's speech, and thus *Buckley* was not controlling.[413]

The final argument for strict scrutiny raised by the cable industry was based on its contention that the 1992 Cable Act was to be applied in a discriminatory manner because it did not apply to other analogous video delivery systems.[414] These include multi-channel multi-point distribution systems and satellite master antenna television.[415] Justice Kennedy dismissed this claim,[416] pointing to the Court's decision in *Leathers v. Medlock*,[417] where it upheld a tax that applied solely to cable television services.[418] He further noted that "heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium

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[409] 424 U.S. 1 (1976).

[410] *Turner*, 114 S. Ct. at 2467.

[411] *Id.*

[412] *Id.*

[413] *Id.*

[414] *Id.*

[415] *Turner*, 114 S. Ct. at 2468. Multi-channel multi-point distribution systems use one transmitter from a high building, which beams signals to thousands of homes. *See* Robert Brehl, *Firm Fights for Right to Snip Cable's Cord; CRTC Doesn't Allow Wireless Cable TV System*, TORONTO STAR, Feb. 15, 1995, at B1. It is used in remote areas where it is too expensive to run traditional cable. *See id.* Satellite master antenna television provides cable signals directly to microwave dishes on the tops of apartment buildings, as well as office buildings, where each apartment or office is wired into an on-site satellite dish. *See* Jonathan Ringel, *Apartment Life—Some Apartment Complexes Have Own Cable TV Systems*, ATLANTA J. & CONST., Sept. 18, 1994, at H45.

[416] *Turner*, 114 S. Ct. at 2468.

[417] 499 U.S. 439 (1991).

[418] *Id.* at 440; *see Turner*, 114 S. Ct. at 2468.

being regulated."[419] In this case, that "special characteristic" was the "bottleneck monopoly power" of the cable industry.[420]

Having dismissed the government's argument for a rational basis standard and the cable industry's argument for strict scrutiny, the majority concluded that the appropriate standard to apply was intermediate scrutiny.[421] As Justice Kennedy explained, a regulation satisfies such scrutiny if it "'promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[422]

In analyzing the must-carry provisions under this test, Justice Kennedy first listed the three "interrelated interests" Congress had used to justify the provision: (1) preserving the benefits of free broadcast television; (2) promoting "widespread dissemination of information from a multiplicity of sources;" and (3) promoting "fair competition."[423] "[V]iewed in the abstract," Justice Kennedy concluded, "we have no difficulty concluding that each of them is an important governmental interest."[424] While recognizing the general deference given by courts to congressional determinations, he emphasized that "Congress['s] predictive judgments . . . are [not] insulated from meaningful judicial review altogether."[425] In this case, the "predictive judgments" were Congress's determination that without a must-carry provision, cable operators would drop broadcast stations, and those stations would deteriorate or go out of business.[426]

Justice Kennedy pointed to the failure of the district court record to include sufficient evidence that broadcast stations needed the protection of must-carry provisions.[427] He also criticized the "paucity of evidence . . . concerning the actual effects of must-carry on the speech of cable operators"—evidence necessary to determine

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[419] *Turner*, 114 S. Ct. at 2468 (quoting Minneapolis Star & Tribunal Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983)).

[420] *Id.* at 2468.

[421] *Id.* at 2469.

[422] *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

[423] *Id.* at 2469 (citations omitted).

[424] *Turner*, 114 S. Ct. at 2469.

[425] *Id.* at 2471.

[426] *Id.*

[427] *Id.* at 2472.

whether must-carry suppresses "substantially more speech than . . . necessary."[428] In light of this conclusion, the district court decision was vacated, and the case was remanded for further proceedings.[429]

Justice Stevens concurred in part and in the judgment.[430] He largely took issue with Justice Kennedy's conclusion, supported by only three other members of the Court,[431] that the case should be remanded for further consideration.[432] Based on the evidence before Congress, he argued that "it [was] a practical certainty that a broadcaster dropped from the local cable system would suffer substantial economic harm."[433] Although he admitted that there was no evidence that broadcast stations were actually going bankrupt, Justice Stevens ventured that an "industry need not be in its death throes before Congress may act to protect it from economic harm threatened by monopoly."[434] He also expressed concern that, on being told that they need to show that "substantially more speech than necessary"[435] is being restricted to prevail at the district court level, cable companies will choose to "drop cable programs rather than seeking to increase total channel capacity."[436] Ultimately, however, Justice Stevens was concerned that without his vote there would be no majority or plurality for any position, and thus chose to join the Kennedy bloc of Justices, and concurred in the judgment.[437]

Justice O'Connor wrote an opinion concurring in part and dissenting in part, in which Justices Scalia and Ginsburg joined, and

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[428] *Id.* Justice Blackmun, who joined all of Justice Kennedy's opinion, was not as concerned by such lack of evidence. In his concurring opinion, he emphasized the "paramount importance" of giving "substantial deference" to Congress, but ultimately concluded that in this case the district court would "no doubt . . . benefit" from additional evidence. *Id.* at 2472-73 (Blackmun, J., concurring).

[429] *Turner*, 114 S. Ct. at 2472.

[430] *Id.* at 2473 (Stevens, J., concurring in part, concurring in judgment).

[431] These members were Justices Rehnquist, Blackmun and Souter, who were the only three Justices to join all of Justice Kennedy's opinion. *Id.* at 2451.

[432] *Id.* at 2473.

[433] *Id.* at 2474.

[434] *Turner*, 114 S. Ct. at 2474 (Stevens, J., concurring in part, concurring in judgment).

[435] *Id.* at 2472 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[436] *Id.* at 2475.

[437] *Id.*

in which Justice Thomas joined in part.[438] Although she agreed with the Court's conclusion that cable programmers stand in the same First Amendment position as other members of the more traditional media, Justice O'Connor did not agree that the must-carry provision was completely content neutral.[439] While conceding that there may well have been content-neutral reasons for the legislation, she did not believe that the congressional findings relating to the value of public and commercial broadcast television for news, informational and educational purposes, evinced a content-neutral purpose.[440]

In the second part of her opinion, which Justice Thomas chose not to join,[441] Justice O'Connor argued that even if the legislation was content neutral, it failed the intermediate scrutiny test because it was not narrowly tailored.[442] Drawing analogies to other First Amendment speech cases, she argued that Congress could not justify restrictions on all cable operators because some cable operators "may be motivated by anticompetitive impulses, or might lead to . . . [a] broadcaster going out of business."[443]

Finally, Justice O'Connor argued that, where possible, the market, not Congress, should govern which programming ends up on cable systems.[444] While she admitted that there are instances where Congress has and could continue to regulate cable, she argued that in this case the legislation was simply too broad to be in compliance with the Constitution.[445]

By no means does the decision in *Turner* signal the end of the

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[438] *Id.* (O'Connor, J., concurring in part, dissenting in part).

[439] *Turner*, 114 S. Ct. at 2476 (O'Connor, J., concurring in part, dissenting in part).

[440] *Id.* at 2478.

[441] *Id.* at 2475.

[442] *Id.* at 2479.

[443] *Id.* O'Connor pointed to the Court's decisions in cases like Schneider v. State, 308 U.S. 147 (1939) to support her claim that "[i]f the government wants to avoid littering, it may ban littering, but it may not ban all leafletting." *Turner*, 114 S. Ct. at 2479 (O'Connor, J., concurring in part, dissenting in part).

[444] *Turner*, 114 S. Ct. at 2480 (O'Connor, J., concurring in part, dissenting in part).

[445] *Id.* at 2481. Justice Ginsburg wrote her own opinion essentially adopting Judge Williams' dissent at the district court level. *Id.* Although she did not think that the provisions differentiated on the basis of viewpoint, she did believe that they reflected a "content preference." *Id.* Furthermore, she agreed with Judge Williams that the alleged risks to over-the-air broadcast stations "remain[] imaginary." *Id.*

legal dispute on regulation of cable television. Proceedings before the district court in *Turner* have begun,[446] and will likely lead to another petition to the Supreme Court. FCC and local action to regulate cable television will also continue, along with legislative and other proposals affecting not only cable, but also the entire future "information superhighway." By rejecting strict scrutiny for government regulation not based on content, the Court has opened the door for at least some regulation to accomplish such goals as fostering diversity and competition. At the same time, content-based regulation of cable and other media, such as attempts to regulate so-called "indecency," should receive particularly close scrutiny. And by requiring intermediate scrutiny in *Turner*, moreover, the Court has ensured at least some meaningful First Amendment scrutiny even as to content-neutral regulation in this emerging area.

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[446] *See* Norman M. Sinel et al., *Recent Developments in Cable Law*, *in* COMMUNICATIONS LAW: 1994 503 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G4-3924 (1994)) (stating that in late September, 1994, a three-judge district court, which is hearing the case on remand, directed the parties to submit cross-motions for summary judgment by March 1, 1995).